

Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

November 8, 2005

GSBCA 16706-RELO

In the Matter of ANDREAS FRANK

Andreas Frank, Laguna Niguel, CA, Claimant.

Mary C. Lanham, Chief, Travel Payment Section, Division of Financial Operations, Program Support Center, Department of Health and Human Services, Rockville, MD, appearing for Department of Health and Human Services.

DANIELS, Board Judge (Chairman).

In May 2005, the Department of Health and Human Services (DHHS) transferred Andreas Frank from Washington, D.C., to Irvine, California. The home in which Mr. Frank had been living in Washington was sold during the same month. DHHS reimbursed him for half of the expenses incurred in selling the house. The agency reasoned that because Mr. Frank and another individual held title to the property as joint tenants with rights of survivorship, Mr. Frank had only a half interest in the residence, and because a transferred employee who has only a half interest in a residence he sells is entitled to reimbursement of just half of the sales expenses, that is all Mr. Frank should receive. Mr. Frank contends that he held complete equitable title interest in the property, so the agency should have reimbursed him for all of the sales expenses.

By statute, "an agency shall pay to or on behalf of an employee who transfers in the interest of the Government, expenses of the sale of the residence . . . of the employee at the old official station . . . that are required to be paid by the employee, when the old and new official stations are located within the United States." 5 U.S.C. § 5724a(d)(1) (2000). This mandate is to be exercised consistent with provisions of the Federal Travel Regulation (FTR). Id. §§ 5724a(d)(1), 5738(a)(1).

The FTR makes ownership of the property a critical factor in determining the extent to which a transferred employee may be reimbursed for the expenses of a sale. Reimbursement of all such

expenses is permitted only if title is in the name of the employee alone, in the name of one or more of the employee's immediate family members, or jointly in the name of the employee and one or more of his immediate family members. 41 CFR 302-11.101 (2004). If title is held by others as well, the employee may only be reimbursed on a pro rata basis to the extent that he and/or members of his immediate family hold title. Id. 302-11.103.

"Title," as the term is used in the FTR, encompasses not only actual title but also equitable title. An employee is considered to hold an "equitable title interest" in a residence if any one of five combinations of factors is present. 41 CFR 302-11.105. The issue in this case is whether Mr. Frank met the requirements of the fifth alternative combination of factors as to his former residence. The FTR states, in this regard:

Another equitable title situation exists where title is held in your name only or jointly with you and one or more members of your immediate family or with you and an individual who is not an immediate family member, and the following conditions are met:

- (1) The property is your residence.
- (2) You and/or a member(s) of your immediate family has the right to use the property and to direct conveyance of the property.
- (3) Only you and/or a member(s) of your immediate family has made payments on the property.
- (4) You and/or a member(s) of your immediate family received all proceeds from the sale of the property.
- (5) You must provide suitable documentation to your agency that all conditions in paragraphs (e)(1) through (e)(4) of this section are met.

41 CFR 302-11.105(e).

DHHS agrees that Mr. Frank has provided suitable documentation, as required by the fifth of these factors, as to the first, third, and fourth factors. There is no doubt that Mr. Frank used as his residence in Washington the house that was sold. DHHS accepts copies of wire transfers for the down payment on the house and a record of payments made to the holder of the mortgage loan on it as proof that Mr. Frank alone made all payments on the property. The agency also accepts copies of wiring instructions and a wire transfer as proof that Mr. Frank alone received all proceeds from the sale of the property. Additionally, the agency does not question the settlement sheet from the sale, which shows that Mr. Frank paid all associated expenses. We agree with DHHS

that the documentation is suitable to demonstrate fulfillment of the first, third, and fourth factors of the test imposed by 41 CFR 301-11.105(e).

The question to be resolved by the Board is whether Mr. Frank, who claims no immediate family members, has provided suitable documentation that he met the second factor of having had the right to use the property and direct conveyance of it. The documentation he provided is a memorandum of understanding between himself and Kamal Al-Faqih, the other joint tenant with rights of survivorship, which was signed by the two men in 2003, shortly before the house was purchased. This memorandum states in part:

Andreas and Kamal desire and agree that title to the property shall be in both their names as joint owners with rights of survivorship. The only purpose for having title in that manner is as an estate planning device or technique for Andreas. It is intended, and it is agreed, that Kamal will have no legal or equitable interest in the property at any time and for any purpose prior to the death of Andreas, if at that time this property is still owned.

If at any time prior to his death, Andreas desires to sell or dispose of the property for any purpose, Kamal will join in a deed and any other legal papers that shall be necessary to carry out Andreas' intent, promptly upon Andreas' request. If at any time prior to his death, Andreas shall desire to change the form of title to the property to his own name, Kamal will join in a deed or any other legal papers that shall be necessary to accomplish that, promptly upon Andreas' request.

In arguing that this memorandum of understanding does not prove that Mr. Frank had the sole right to direct conveyance of the property, DHHS calls to our attention section 42-101 of the District of Columbia Code (2005 version). This law establishes requirements for a power of attorney which authorizes an attorney-in-fact to sell, grant, or release any interest in real property in the District. Such a power of attorney must be executed in the same manner as a deed and recorded with the District government. According to DHHS, "a document which purports to convey the right to direct conveyance, should at a minimum, follow the applicable statutes of the District of Columbia with regards to such conveyance. The MOU [memorandum of understanding] does not meet this requirement and thus, in our view, no documentation of the right to direct conveyance of the property has been provided."

As Mr. Frank observes, section 42-101 of the District of Columbia Code is irrelevant to the question of whether the memorandum of understanding between himself and Mr. Al-Faqih reserved to Mr. Frank the right to direct conveyance of the

property. This law establishes requirements for the use of a device through which someone who has title to real property may employ another individual to sign a deed on his behalf. Messrs. Frank and Al-Faqih jointly held title to the Washington, D.C., home in which Mr. Frank resided, and they both signed documentation for the sale of that home. Neither of them had use for a power of attorney in transferring title to the buyers. The memorandum of understanding was a contract between the two men, through which each bound the other to certain actions. We are aware of no legal requirement, in the District of Columbia or elsewhere, which requires contracts to be executed in the same manner as deeds or recorded with the local government.

Notwithstanding the fact that Mr. Al-Faqih's name was on the title, the memorandum of understanding clearly states that Mr. Frank had sole decisionmaking authority as to whether that sale would be made. Mr. Al-Faqih agreed to accept Mr. Frank's decision and to take whatever actions were necessary to accomplish it. To eliminate a concern raised by DHHS, the two men have recently signed a notarized affidavit attesting to the authenticity of their memorandum of understanding. We are convinced that the memorandum, as a form of contract, established that Mr. Frank had the sole right to direct conveyance of the property.

Mr. Frank has demonstrated the existence of all factors essential to a conclusion under 41 CFR 302-11.105(e) that he had a full equitable title interest in his former residence in Washington, D.C. We therefore conclude that for the purposes of reimbursement of sales expenses under the FTR, title to the property was in his name alone, so DHHS must reimburse him for all of those expenses.

STEPHEN M. DANIELS
Board Judge